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Evidence Code: Authentication and Identification

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FLORIDA LAW REVISION COUNCIL

PRELIMINARY WORKING DRAFT

Evidence Code

AUTHENTICATION AND IDENTIFICATION

Charles W. Ehrhardt, Reporter

The ideas and conclusions set forth herein, including the draft of proposed legislation, have not been seen or approved by the Florida Law Revision Council. This material is being circulated to members of the bench and the bar for the purpose of eliciting comments and suggestions for improvement. Any communication concerning this project should be sent in writing to the Law Revision Council, Holland Building, Room 346, Tallahassee, Florida 32304.

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INTRODUCTION

For several years, the Florida Law Revision Council has studied and considered the desirability and need for statutory adoption of most of the basic rules of evidence. At first, the Council carefully explored and received advice on the obvious threshold questions of whether the rules of evidence are appropriate for codification and, if so, whether this should be accomplished through legislative enactment or through court rules.

The need for codification has long been accepted by leading scholars in the field of evidence, see Morgan, Forward, A.L.I. Model Code of Evidence 6 (1942); Ladd, A Modern Code of Evidence, 27 Iowa L. Rev. 213, 214 (1942); McCormick, Evidence, xi (1954), and there is a clearly developing trend throughout the United States toward this effort, "Public discussion must concern itself with the merits, means and objectives of codifying the entire law of evidence.....Failure to do so is more than a failure in semantics-it is a failure in vision." Papale, Editorial: Reflections on the Proposed Louisiana Code of Evidence, 12 Loyola L. Rev. 51, 53 (1965-66). Growing caseloads continue to put strains on the time of trial judges and attorneys and on their ability to "find the Law" in the rapidly increasing number of reported cases. The pace of modern litigation does not allow the luxury of hours spent in the law library finding cases to support the many basic rules of evidence.

The need to aid bench and bar in the trial of lawsuits is

accompanied by a corollary need for uniformity within the state. Many of those urging the Council to undertake this project were motivated by a lack of uniformity in the application of the case law of evidence. Even those who have become comfortable with the present sources of evidence law must concede that uniformity does not now exist throughout the state.

The debate over whether the enactment of a comprehensive code of evidence should be accomplished by legislation or by court rules will continue, see, Green, To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?, 26 A.B.A. J. 482 (1940). The point was debated before adoption of the Federal rules by the Supreme Court, and several states have faced the issue, see Cal. Stat. Ann., Evidence, §§1-1605(1966); N.J. Stat. Ann. §§2A:66-81 through 2A:66-84; Kan. Stat. Ann. §§60-401 through 60-470 (1964); also see Note, Evidence Law in Wisconsin: Towards a More Practical, Rational and Codified Approach, 1970 Wisconsin L. Rev. 1178.

Florida's division of authority between the Legislature and the Supreme Court with respect to substantive law and procedural law would make the promulgation of a code of evidence impossible without the cooperation of these two branches of government. Fla. Const. Art. V, Sec. 2 (1972 revision). Questions of substance vs. procedure have been debated for years, and no one has ever been able to draw a clear dividing line. More important, even if a line could be drawn the substance and procedure of the law of evidence are often too interwoven to be separated. A code of evidence must contain both substance and procedure, so its promulgation must be a cooperative effort between the Legislature and the Supreme Court. The Law Revision Council must find the avenue of cooperation between these branches of government which will allow the enactment of rules of evidence free from doubts concerning the constitutional authority of either the Court or the Legislature to promulgate this hybrid of substance and procedure.

In summary, the Council is attempting to draft an organized, orderly, statutory expression of the law of evidence, based on the opinions of our state courts and supplemented where necessary by the decisions of the Federal courts and those of our sister states. The Council recognizes that an evidence code cannot provide a clear answer to every question that may arise, and the courts will still be left with the job of interstitial development; but a code can provide the basic structure of the law of evidence. Members of the bench, the bar and the Legislature have been asked to help. Until its final recommendation to the Legislature the Council will continue to analyze and examine the tentative drafts. The Council solicits written comments from lawyers, judges, teachers, bar groups, and anyone else interested in the law of evidence.

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REPORTER'S INTRODUCTORY MEMORANDUM

Submitted herewith is the Preliminary Wroking Draft of the section of the Florida Code of Evidence dealing with Authentication and Identification.

This section is one of the ten that will be included in the Code. The outline under which the Reporter is preparing the Preliminary Working Draft is:

Section 90.100	General Provisions
Section 90.200	Judicial Notice
Section 90.300	Presumptions
Section 90.400	Relevancy
Section 90.500	Privileges
Section 90.600	Witnesses (Competency, Impeachment, Character, Refreshing Recollection, etc.)
Section 90.700	Opinions and Expert Testimony
Section 90.800	Hearsay
Section 90.900	Authentication and Identification
Section 90.1000	Contents of Writings, Recordings and Photographs (Best evidence rule, Summaries, etc.)

In the Authentication section, a number of illustrations of situations which meet the requirement for authentication are included in the comment to Section 90.901. In addition, several types of documents and writings which are self-authenticating are listed; among them, a document which does not bear a seal but purports to bear a signature of an officer or employee of a governmental agency

is self-authenticating as well as printed materials purporting newspapers and periodicals. The testimony of a subscribing witness is not necessary to authenticate a writing unless a statute requiring attestation specifically so requires. The Reporter has included a few of the provisions, although he is not certain that they are desirable.

It is hoped that the discussion and comment which will result from the circulation of this portion of the Preliminary Working Draft will lead to the proper resolution of whether the various provisions should be included in the Code. Without the inclusion of these provisions in this draft, the necessary discussion would not occur.

The remaining sections of this Preliminary Working Draft will be submitted as soon as they are completed. The present plans of the Reporter are that their submission will be by November 1973.

AUTHENTICATION AND IDENTIFICATION

Section 90.901 Requirement of Authentication or Identification. Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Put specifics in comments

See appendix Note 2-3

COMMENT

Authentication and identification are implicit in the concept of relevancy. McCormick, Evidence §218 (2nd ed. 1972); Weinstein and Berger, Basic Rules of Relevancy in the Proposed Federal Rules of Evidence, 4 Ga. L. Rev. 43 (1969). For example, a telephone conversation may be irrelevant because it is on an unrelated topic, or because the speaker is not identified. The latter aspect is involved in authentication and identification.

This section recognizes the long-established principle that evidence is inadmissible unless accompanied by some showing of its genuineness. See, e.g., Delong v. Williams, 232 So. 2d 246 (Fla. 4th Dist. 1970) (unauthenticated transcript of prior hearing not admissible). This preliminary requirement falls within the category of conditional relevancy and is governed by the procedure set forth in Section 90.105(b) granting the court the power to admit evidence subject to the introduction of evidence sufficient to support a finding of relevancy. Once a prima facie showing

of authenticity is made, the evidence comes in, and the ultimate question of authenticity is for the jury. McCormick, Evidence §227 (2nd ed. 1972). The admission into evidence of a matter merely indicates initial sufficiency for presentation to the trier of fact. Once the matter is in evidence the opposing party is free to challenge its genuineness. The court or the jury may find it to be not genuine. 7 Wigmore, Evidence §2128, p. 564 (3rd ed. 1940). Authentication and identification do not assure admission into evidence, since other bars, hearsay for example, may still remain. Brown, Authentication and the Contents of Writings, 1969 Law & Social Order 611. The requirement of authentication is not limited to writings, but requires identification whenever any personal connection with a corporeal object is assumed in the offer. 7 Wigmore, Evidence §2129 (3rd ed. 1940).

In recent years, numerous writers have seriously questioned the rigid traditional standards by which otherwise relevant evidence has been tested for authenticity. See Strong, Liberalizing the Authentication of Private Writings, 52 Cornell L.Q. 284 (1967); Brown, Authentication and the Contents of Writings, 1969 Law & Social Order 611. McCormick suggested that the principal common law justification for the requirement of authentication, as a check on the perpetration of fraud, is no longer valid. The common law skepticism is contrary to the assumptions of genuineness encountered in everyday experience, and, genuineness may be correctly assumed in 99 of 100 cases. In addition, the slight obstacles to fraud which are posed by rigid requirements are generally outweighed by the "time expense and occasional untoward

results entailed by the traditional negative attitude toward authenticity." McCormick, Evidence §218, p. 545 (2nd ed. 1972).

The need for authentication and identification has been reduced by modern pre-trial practice, including requests for admission of genuineness, and the pre-trial conference. See Fla. Civ. Pro. Rules 1.370 and 1.200. However, a need for suitable means of proof still exists since criminal cases pose their own obstacles to the use of preliminary procedures and involve a higher standard of proof, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

For similar provisions, see Calif. Evid. Code §§1400, 1401; New Jersey Evid. Rule 67; Kansas Code of Civ. Pro. §60-464; Fed. Rule Evid. 901(a).

The following are examples of when courts have found evidence to be properly authenticated:

(a) Testimony of a witness with knowledge that a matter is what it is claimed to be. This means of establishing the genuineness of offered evidence was recognized in Florida in Leighton v. Harmon, 111 So. 2d 697, 701-02 (Fla. 2nd Dist. 1959):

> The authenticity of the instrument . . . may be proved by anyone who has knowledge of the facts. The source of knowledge of the witness is subject to the test of cross-examination by the opposition.

See Harwell v. Blake, 180 So. 2d 173, 175 (Fla. 2nd Dist. 1965) which suggests that for certain records to be admissible "someone should have testified with knowledge of the record."

The scope of this means of authentication encompasses a wide range of situations, such as testimony of a witness who was

present at the signing of a document, see Calif. Evid. Code §1413 (eyewitness to signing), or testimony tracing the custody of bullets from the time they were taken from the victim up to the time of their introduction into evidence at the trial. Calloway v. State, 189 So. 2d 619 (Fla. 1966). See Fed. Rule Evid. 901(b)(1). Non-expert opinion testimony as to the genuineness of handwriting based upon sufficient familiarity not acquired for the purposes of the litigation.

(b) Non-expert opinion testimony as to the genuineness of handwriting based upon sufficient familiarity not acquired for the purposes of the litigation. See Clark v. Grimsley, 270 So. 2d 53 (Fla. 1st Dist. 1972) (authentication of deceased's handwritten letters by testimony of frequent visitor familiar with handwriting). Familiarity may be established in any number of ways, such as when the witness has seen the person write on different occasions, Pitman v. State, 51 Fla. 94, 41 So. 385 (1906), or has seen writings purporting to be those of the person in question under circumstances indicating their genuineness. Familiarity with the writing obtained for the purposes of litigation is only admissible as expert testimony and is not admissible under this subsection.

Whether a lay witness is sufficiently familiar with the supposed writer's handwriting is a preliminary question of fact, governed by Section 90.105(b). In a close case where proof of handwriting will determine an essential element in a criminal prosecution, the court may exercise its discretion in determining whether sufficient familiarity exists and demand expert testimonial proof. See Note, Authentication and the Best Evidence Rule under the Federal Fules of Evidence, 16 Wayne L. Rev. 195, 200 (1969).

See Fed. Rule Evid. 901(b)(2); Calif. Evid. Code §1416. (Fla. Stat. §92.03 provides for jury consideration of disputed writings).

(c) The appearance, contents, substance, internal patterns or other distinctive characteristics in conjunction with other circumstances may be sufficient to authenticate the evidence. For example, the "reply letter" doctrine is recognized as a method of authenticating a letter received in reply to one mailed by the sender in Boykin v. State, 40 Fla. 484, 488, 24 So. 141, 143 (1898):

> The rule is that where a letter is addressed to a party at his post office address, and is sent by mail, and a reply thereto, purporting to be from the party to whom it is sent, is received by the sender of the letter in due course of mail, the letter thus received in reply is admissible in evidence without proof that it is in the handwriting of, or signed by, the party purporting to have sent it.

See Atlas Subsidiaries of Florida, Inc. v. O. & O. Inc., 166 So. 2d 458 (Fla. 1st Dist. 1964) (letter apparently in reply held admissible); Calif. Evid. Code §1420 (authentication by evidence of reply).

The Florida rule is quite broad. For example, in Silva v. Exchange Nat. Bank, 56 So. 2d 332 (Fla. 1951) the Supreme Court upheld the authenticity of a typewritten, unsigned letter, where the envelope containing the letter was addressed in the purported writer's handwriting and bore his return address. In general, authentication by circumstances is based on the assumption that a communication or document, which discloses knowledge that only the purported sender would be likely to have, was made by

the person with such knowledge. McCormick, Evidence §225 (2nd ed. 1972). See Calif. Evid. Code §1421 (authentication by content).

Authentication occurs in any situation where the offered item, considered in light of the circumstances, logically indicates the personal connection sought to be proved. For example, see Worley v. State, 263 So. 2d 613 (Fla. 4th Dist. 1972) (distinct characteristics of voiceprint justifies admission to corroborate identification of telephone bomb-threat caller).

(d) Authentication of aural identifications made under circumstances connecting them with the speaker. As noted by the court in Weinshener v. State, 223 So. 2d 561, 563 (Fla. 3rd Dist. 1969): "It is well settled in Florida that a person may be identified . . . solely by means of voice recognition." See Cason v. State, 211 So. 2d 604 (Fla. 2nd Dist. 1968). This rule also applies to electronic means of voice reproduction. See Worley v. State, 263 So. 2d 613 (Fla. 4th Dist. 1972) (telephone).

Since identification by hearing a voice is not the subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect, resembling visual identification of a person. See Simon v. State, 209 So. 2d 682 (Fla. 3rd Dist. 1968) (robbery victim identified defendant upon apparently later recognition of his voice).

See Fed. Rule Evid. 901(b)(5).

(e) Generally in most jurisdictions a statement of identity by a person talking on a telephone is not in itself sufficient

proof of such identity, in the absence of corroborating circumstances. See Annot., 105 A.L.R. 326 (1936), 71 A.L.R. 5 (1931) (admissibility of telephone conversations in evidence). Corroboration could be shown by voice identification, see example (d), or by a disclosure of information known only to the person calling or called, see example (c). Another simple means exists to identify the person called, based on evidence of a call which is made to the number assigned by the telephone company, together with the person answering identifying himself as the party called. When considered in light of the accuracy of the telephone system and the absence of motive or opportunity for premeditated fraud, this evidence justifies the conclusion that the party called was the one intended to be reached. McCormick, Evidence §226 (2nd ed. 1972).

In the case of a call to a business office, the constant use of telephones as a means of conducting business dictates admission of such calls. Where a conversation with someone who assumed to have the requisite authority is within the normal scope of transactions carried out over the telephone, no further proof of identification is required.

See Fed. Rule Evid. 901(b)(6).

(f) Public documents held in public offices have long been exempt from the ordinary requirements of authenticity. In Bell v. Kendrick, 25 Fla. 778, 785, 6 So. 868, 869 (1889), the Florida Supreme Court recognized that:

> Official registers or books kept by persons in public office, in which they are required, whether by statute of by the nature of the office, to write down particular transactions occurring in the course of their public duties . . . are generally admissible in evidence, notwithstanding their authenticity is not confirmed by the ordinary test of truth . . . .

It is well established that public records may be authenticated by proof of proper custody alone. McCormick, Evidence §224 (2nd ed. 1972). Generally, Florida courts have justified dispensing with the requirement of further proof of public documents on the theory of judicial notice. See, e.g., Florida Accountants Ass'n v. Dandelake, 98 So. 2d 323, 327 (Fla. 1957) ("This court takes judicial notice of the public records of this state."). Indeed, a wide range of public documents has been judicially noticed. See State ex rel. Douglas v. Cone, 133 Fla. 17, 182 So. 449 (1938) (reports from Treasurer's Office); State ex rel. Glynn v. McNayn, 133 So. 2d 312 (Fla. 1961) (election results in office of Secretary of State). As Wigmore has noted, such judicial notice amounts to a ruling that custody is sufficient evidence of genuineness. 7 Wigmore, Evidence §2158, p. 627 (3rd ed. 1940).

While existing Florida law does not explicitly provide for the authentication of public records stored in computers or by other modern storage methods, reasoning similar to that in the previously discussed rule would be applicable. Cf., Fla. Stat. §92.36(2) (records kept by means of electronic data processing admissible under Business Records Act).

See Fed. Rule Evid. 901(b)(7); Calif. Evid. Code §§1532, 1600.

(g) Ancient documents may be authenticated by application of the ancient document rule which has long been a part of Florida law. In Clark v. Cochran, 79 Fla. 788, 794, 85 So. 250, 253 (1920) the Supreme Court found certain old documents to be admissible:

> These documents bore dates from 1857 to 1880 . . . they came from a place where they would naturally be found if genuine . . . and there is no evidence of fraud or suspicious circumstances . . . . [W]e think the documents offered in this case were admissible as ancient documents.

The ancient document exception to the requirement of extrinsic proof of authenticity has been justified on at least two grounds: difficulty of proof after so long a period of time and the unlikelihood of a still viable fraud. McCormick, Evidence §223 (2nd ed. 1972). Although the common law provided for a period of thirty years, the Florida courts have not established a time period. The trend in recent years toward statutory reduction, 7 Wigmore, Evidence §2143 (3rd ed. 1940), and a shorter period is justified by the same principles which justified the common law period. See Fla. Stat. §92.08 (deeds and powers of attorney of record for 20 years as evidence of the truth of the facts therein).

This rule should be expanded to include data stored in computer banks or by other modern storage techniques. Since appearance in such cases becomes meaningless, the importance of custody or place where found will increase correspondingly.

The application of this method is not limited to title documents, see Drake v. Fort Lauderdale, 227 So. 2d 709 (Fla.

4th Dist. 1969) (ancient map), or to recorded instruments, Sullivan v. Richardson, 33 Fla. 1, 14 So. 692 (1894) (documents found in an old trunk), but extends to any document which meets the criteria.

See Oregon Rev. Stat. 1963, §41.360(34); Fed. Rule Evid. 901(b)(9).

(h) A writing is authenticated when it is offered against a party who had admitted its authenticity or acted upon it as authentic. A writing which is admitted to be genuine by the person against whom it is offered or which he has acted upon as authentic in the ordinary course of his affairs possesses trustworthiness. Wigmore found such a rule inferred from daily experience and further, to be justified by placing the burden of disproving genuineness on the person to whom evidence was most readily available. 7 Wigmore, Evidence §2160 (3rd ed. 1940); see Calif. Evid. Code §1414; Note, Authentication and the Best Evidence Rule under the Proposed Federal Rules of Evidence, 16 Wayne L. Rev. 195 (1969); Cone v. Benjamin, 27 So. 2d 90 (Fla. 1946) (volume containing family tree authenticated by evidence that family members regarded it as genuine).

(i) Methods of authentication may be provided by the legislature or rules of court. For example Florida Rule of Civil Procedure 1.310(f) provides for authentication of depositions and Fla. Stat. §656.23 provides for authentication of copies of certain bank records.

See. Fed. Rule Evid. 901(b)(10).

Section 90.902 Self-Authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to:

(1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a court, political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation of execution.

(2) A document not bearing a seal which purports to bear a signature of an officer or employee of any entity listed in subsection (1), affixed in his official capacity.

rewritten to clarify

(3)(a) An official foreign document or record or entry therein which is:

(1) Executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and

(2) Accompanied by a final certification, as provided in paragraph (b), as to the genuineness of the signature and official position of:

(a) The executing person or

(b) Any foreign official whose certificate

of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

(b) The final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(c) When all parties receive reasonable opportunity to investigate the authenticity and accuracy of official foreign documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) A copy of an official public record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the

custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of §90.902 or complying with any act of the legislature or rule adopted by the supreme court.

(5) Books, pamphlets or other publications purporting to be issued by a governmental authority.

(6) Printed materials purporting to be newspapers or periodicals.

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Commercial papers, signatures thereon, and documents relating thereto to the extent provided by the Florida Statutes in the Uniform Commercial Code.

(9) Any signature, document or other matter declared by the legislature to be presumptively or prima facie genuine or authentic.

omitted #8 "documents accompanied by a certif/genuineness"

COMMENT

A number of exceptions to the requirement of authentication have been recognized in statutes and case law over the years. Based on experience, policy considerations and the unlikelihood of forgery, the law has come to recognize that the genuineness of certain writings could be safely presumed, at least for the

purposes of admission into evidence. Under this section, the documents described, if otherwise admissible, will be admitted without proof of genuineness beyond what is purported on the face of the document itself. However, the opposing party is not foreclosed from challenging the authenticity of the document once it is admitted in evidence. This procedure dispenses with the necessity of proof of authenticity when there is no real dispute as to such authenticity, while assuring the parties the right to contest the authenticity when there is a real dispute.

Subsection (1) This subsection assumes, for the purposes of admissibility, the genuineness of a public document bearing an official seal and a signature. At common law, the genuineness of a document bearing an official seal was established simply by production of the document for inspection. Note, Authentication and the Best Evidence Rule Under the Federal Rules of Evidence, 16 Wayne L. Rev. 195, 210 (1969). In Groover v. Coffee, 19 Fla. 61, 71 (1882), in sustaining the authenticity of certain land grants bearing the Georgia Governor's seal, the Supreme Court noted that: "Courts recognize, without other proof than inspection, the seals of other states and nations." Such a rule finds justification in the inconvenience of furnishing further proof, and the fact that forgery is a crime and detection is fairly easy and certain. 7 Wigmore, Evidence §2161, p. 638 (3rd ed. 1940).

The theory of judicial notice alone may satisfy the requirement of authentication of documents bearing seals of this state.

See §90.202(m). However, this subsection provides for the authentication of documents bearing the seal of a court, political subdivision, department, office, or agency of this state when accompanied by a signature purporting to be an attestation of execution. The design of seals of foreign jurisdictions would frequently be unfamiliar to the judge, and the justification for the presumption of genuineness lies in the additional requirement of a signature. In this situation, the impression of the seal is sufficient to satisfy the first general requirement of authenticity, that the document was genuinely executed by the purported signer is his official capacity. Judicial notice that the signer holds the office that he claims completes the authentication. 7 Wigmore, Evidence §2161, p. 639 (3rd ed. 1940).

While the rule is most often recognized with respect to certified copies, see Fla. Stat. §92.12 (copies of records of public officers), it is broadly applied. See, e.g., Fla. Stat. §92.18 (certificate of official acts by state officers); Fla. Stat. §92.20 (certificates relating to agricultural products issued under seal of United States governmental departments).

For similar rules, see Calif. Evid. Code §1452 (official seals presumed genuine); Fed. Rule Evid. 902(1).

Subsection (2) This subsection raises a presumption of genuineness of purported official signatures in the absence of an official seal. This rule conflicts with several older Florida cases which held that the genuineness of a document bearing only an official signature must be proved by extrinsic evidence. For

example, in Cobb v. State, 82 Fla. 233, 89 So. 417 (1921) the court ruled inadmissible a marriage certificate purportedly from a New York public official, signed in his official capacity:

> We think the trial court erred in admitting this paper because of a total lack of proof of its authenticity. It is not even dignified by an official seal . . . . [T]here is nothing outside the assertions of the paper itself . . . to identify the authenticity or even the genuineness of the paper as being bona fide what it purports to be on its face.

See Yellow River R.R. v. Harris, 35 Fla. 385, 17 So. 568 (1895) (signed receipt from United States Land Office not self-verifying).

More recently exceptions to this requirement of proof have been created by statute. See Fla. Stat. §92.32 (official records signed by United States officer or employee presumed genuine).

Justification for theolder rule was expressed in Yellow River R. R., supra at 569, "were the rule otherwise, a forged receipt in proper form might be fraudently made to answer the same purpose as the genuine article." See also 7 Wigmore, Evidence §2167 (3rd ed. 1940). While fear of fraud remains a valid concern of the law of authentication, see comment to Section 90.901(b), the diminished importance of the seal and the improved methods of detecting forgeries seem to justify the more permissive rule. See Calif. Evid. Code §1453 (domestic official signature presumed genuine and authorized). Fed. Rule Evid. 902(b)(2) provides for authentication of a public document not under seal only when a public officer, who has a seal and official duties in the same district as the person who signed the document, certifies under

seal that the signer has the official capacity and that the signature is genuine.

Subsection (3) This subsection restates, with some expansion, existing section 92.032 of the Florida Statutes, the existing procedure for authentication of foreign documents. An official foreign document is self-authenticating when it is attested by a person in his official capacity who is authorized by the laws of the foreign country to make the attestation and is accompanied by a "final certification" of the authority of the attesting foreign official by a United States foreign service officer or an official of the foreign country who is assigned to the United States. Although a United States foreign service officer can certify the genuineness of signature and official position of the executing or attesting person, this subsection recognizes that he may not be able to certify to the official position and signature of the particular foreign official. Accordingly, the original signature of that foreign official is permitted to be certified by a higher foreign official, whose signature can in turn be certified by a still higher official, and such certification can be continued until a foreign official is reached as to whom the United States foreign service officer has adequate information upon which to base his final certification.

The section 92.032 requirement of a seal by the certifying officer has been eliminated, for the reasons stated in subsection (2). Under this subsection, a certificate of genuineness may be made by a diplomatic officer of the foreign nation, if he is

assigned to the United States, as well as by a U. S. foreign service officer. The signature of such an official would be as easily verifiable as the signature of a United States official.

Finally, the judge may order that uncertified documents be treated as presumptively genuine, where all parties have had a chance to investigate their authenticity. Cf., Fla. Civ. Pro. Rule 1.200 (pre-trial evidentiary arguments). This provision, as well as the provision for summaries, in the event of voluminous records, see 4 Wigmore, Evidence §1230 (Chadbourn rev. 1972), is a matter of convenience.

For similar provisions, see Calif. Evid. Code §1454; Fed. Rule Evid. 902(3).

Subsection (4) This subsection provides for self-authentication of copies of public records, including data compilations, when the document is authorized by law to be recorded or filed and is actually filed or recorded in a public office and is certified by the custodian or authorized person as a true and correct copy. The copy itself becomes, upon certification, a public document and to be authenticated the certificate must comply with either subsection (1), (2) or (3).

The presumption of genuineness under this subsection applies only to copies of public records, reports and recorded documents authorized by law to be recorded and filed and actually recorded and filed in a public office and does not apply to copies of public documents in general. Consequently, some public documents, for example, a register of deeds, may not be authenticated under

this subsection but when presented in original form may be authenticated under paragraphs (1), (2) or (3). Also, certified copies of most corporate records are not covered by this subsection since they are not required by law to be filed. Since certification of a copy eliminates the need for proof of the genuineness of the original, 5 Wigmore, Evidence §1677, p. 745 (3rd ed. 1940), the applicability of this subsection is limited to those public documents which contain safeguards as to their authenticity, such as recorded documents which have been proved or acknowledged. Copies of public documents not included in subsection must be authenticated by other means. See, e.g., Section 90.901(b).

This provision is similar to existing Fla. Stat. §92.32, which presumes the authenticity of a certified copy of official reports and records signed by an authorized official or employee of the United States government. That statute is extended by this subsection to recorded documents, and includes all political subdivisions within the United States.

See Fed. Rule Evid. 902(4).

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Subsection (5) Publications purporting to be made under authority of government have long been self-authenticating and exempt from the requirement of preliminary proof of authenticity. For example, in Thiesen v. Gulf, F. & A.R.R., 75 Fla. 28, 68, 78 So. 491, 503 (1917) (on rehearing), the Florida Supreme Court stated:

> The American State Papers . . . is a publication under the authority of the Senate of the United States . . . these documents are received in evidence without other proof of their authenticity than the published volume.

While the rule has been applied by statute to published volumes

of statutes and reports of court decisions, see Fla. Stat. §§92.01-.03, several cases have extended the principle to a variety of government publications. See, e.g., State ex rel. Board of Commissioners v. Helseth, 104 Fla. 208, 140 So. 655 (1932) (legislative journals); Freimouth v. State, 249 So. 2d 754. (Fla. 1st Dist. 1971) (Federal Register). See Fed. Rule Evid. 902(5).

Subsection (6) This subsection provides that printed materials purporting to be newspapers or periodicals shall be presumed authentic. The unlikelihood of forgery and the relative ease with which forged publications could be refuted by the publisher serve to justify the admission of printed matter in evidence without further proof. The presumption involved here is actually quite narrow, i.e., a purported copy of a newspaper or periodical is presumed genuine for purposes of admission into evidence. However, the question of authorship and responsibility for the items contained in the publication may remain. Cf., Fla. Stat. §817.41 (presumption that the person receiveing benefits of false advertising is responsible therefor). See Brown, Authentication and the Contents of Writings, 1969 Law & Soc. Order 611, 632. See Fed. Rule Evid. 902(6).

Subsection (7) This subsection extends the presumption to trade inscriptions and the like. A number of justifications exist for this provision: the risk of forgery is minimal, trademark infringement is a crime, great efforts are devoted to inducing the public to buy in reliance on brand names and substantial protection is given them.

Generally, the question has arisen in products liability cases. In view of modern mass-marketing techniques, the better rule seems to place the burden on the registrant of the trademark or label to disprove his connections with the product. Such a rule not only draws the conclusion from everyday experience, but often places the burden of proof on the party best able to refute the presumption. See Brown, Authentication and the Contents of Writings, 1969 Law & Social Order 611, 629.

See Fed. Rule Evid. 902(7).

Subsection (8) Florida's Uniform Commercial Code, Fla. Stat. ch. 671-87, provides in several instances for self-authentication of certain commercial papers. See, e.g., Fla. Stat. §671.202 (authorized third-party document is prima facie evidence of its own authenticity).

This subsection makes clear that established commercial practices for authentication are not foreclosed by this code of evidence as an appropriate means of proof of genuineness.

See Fed. Rule Evid. 902(9).

Subsection (9) This subsection continues in effect existing statutory provisions relating to self-authentication. See, e.g., Fla. Stat. §90.01 (acknowledgement authenticated by seal and signature of certain persons); Fla. Stat. §372.051 (copies of certain records of the Game and Fresh Water Fish Commission certified by the director under his seal are admissible without further authentication).

Section 90.903 Testimony of Subscribing Unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless the statute requiring attestation specifically so requires.

COMMENT

This section provides that the testimony of attesting witnesses is not necessary unless specifically provided by statute. In Windle v. Sibold, 241 So. 2d 165 (Fla. 4th Dist. 1970), the court said:

> Appellees contend that there is still in effect in this state the common law principle that when a written instrument attested by a subscribing witness is offered as evidence, its execution must be proved by such subscribing witness if he is available as a witness and is competent to testify . . . . [I]t is our view that this common law rule was long ago abolished as part of the adjective law of this state.

While the common law required that attesting witnesses be produced or accounted for, McCormick, Evidence §220, p. 545 (2nd ed. 1972), the requirement has generally been abolished. See Calif. Evid. Code §1411; Kansas Code of Civ. Pro. §60-468; Uniform Rule of Evid. 71; Fed. Rule Evid. 903.

This section does not eliminate the requirement of the testimony of a subscribing witness when a statute specifically requires it. See, e.g., Fla. Stat. §732.24 (proof of wills).

APPENDIX

Section 92.38 Comparison of Disputed Writings.

don't need to have expert testimony - can submit to jury like other facts

(1) The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

(2) The genuineness of writing, or lack thereof, may be established by a comparison made by an expert witness with a writing established as genuine as provided in Subsection (1).

COMMENT

This section differs from the existing Section 92.38 in ~~one~~ 1 significant aspect. Both require that before a writing in dispute may be compared with a specimen writing that it be proved "to be genuine" to the satisfaction to the court. See Chemical Exchanged Bank & Trust Co. v. Frankel, 111 So. 2d 99 (Fla. 3rd Dist. 1959). The existing statute was interpreted in Brantly v. State, 84 Fla. 649, 94 So. 678 (1922) to involve an extremely high standard of proof:

put in something about 105

> [W]e are of the opinion that unless the evidence of the genuineness of the standard is so clear that, if it were one of the issues in the case for the jury to determine, a verdict should be directed in favor of its genuineness by the court, it may not be properly allowed in evidence.

This subsection removes the bar to the submission of both the standard and disputed handwriting to the jury without the aid of expert witnesses. In Clark v. State, 114 So. 2d 197 (Fla. 1st Dist. 1959) the jury was permitted to compare an admitted standard with the alleged forgery. The Court interpreted the existing statutory provision and held that "a juror, whose qualifications do not require that he be able to read or write, is not competent to determine whether a disputed signature or writing was made by the same person whose admittedly genuine signature or writing is in evidence, without the aid of skilled or expert testimony." 114 So. 2d at 203. This interpretation is against the great weight of authority. 7 Wigmore §2002 (3rd ed. 1940) states:

> When in the history of jury-comparison . . . . the propriety of it began to be argued about, the first opposing reason that came up for consideration was that the jury frequently could not read writing and hence it was useless to submit writings to them . . . . This reason . . . was in England no longer considered sufficient to exclude such comparison; and in the United States it was almost unanimously repudiated, -- not on the sensible reason that it was unsound, but for the reason, more satisfying to the national pride, that juries could seldom be reproached with it. So far as soundness of precedent is concerned, the circumstance is certainly suspicious that . . . so powerful a reason did not avail in all departments of proof to keep written evidence from the jury. So far as soundness of principle is concerned, it was not credible to eminent judges to argue that, because some juries could not read and thus could not compare, therefore juries that could read and compare should not be allowed to compare. There is solemn absurdity in such a "non sequitor".

See Annot., 80 A.L.R. 2d 272 (1961) (propriety of trier of fact making a comparison without the aid of an expert witness).

The failure to permit the jury to make the comparison in the absence of expert testimony is anomalous with other functions of the jury. For example, a non-expert witness may identify handwriting based solely on his memory, see Section 90.901 (Comment - example 2) and a jury can consider such evidence, but a jury cannot determine its genuineness even by a side-by-side comparison with specimens shown to be genuine. Also, when expert testimony is presented only on one side of an issue, the jury may disregard the testimony and return a finding in conflict with the expert opinion. Robertson v. Robertson, 106 So. 2d 590 (Fla. 2nd Dist. 1958). See South Venice Corp. v. Caspersen, 229 So. 2d 652 (Fla. 1st Dist. 1970); Kinney v. Mosher, 100 So. 644 (Fla. 1st Dist. 1958); 2 Wigmore, Evidence §673 (3rd ed. 1940). If a jury is qualified to discredit the only expert testimony on an issue, they are qualified to make the same determination without any expert testimony being offered.

For similar provisions, see Calif. Evid. Code §§1417-18; Fed. Rule Evid. 901(b)(3).